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**BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA**

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| KATRIN R. CHANDLER, an individual with senior water rights in the Horse Creek watershed; BETTY J. Lannen, an individual with senior water rights in the Horse Creek watershed; POLLY REX, an individual with senior water rights in the Horse Creek watershed; JOSEPH MILLER, an individual with senior water rights in the Gallatin River Valley; and THE CLARK FORK COALITION, a non-profit organization with senior water rights in the Upper Clark Fork watershed, | ) |
| Petitioners. | ) |

## STATEMENT OF POSITION

The Montana Water Well Drillers Association, hereinafter referred to as "MWWDA", by and through its undersigned counsel of record, Moore, O'Connell & Refling, P.C., submits the following Statement of Position on "Whether the 'combined appropriation' administrative rule definition (Rule 36.12.101 (13) ARM) is consistent with applicable law under the Montana Water Use Act, § 85-2-101 *et seq.*, MCA.

MWWDA's position is that the Department of Natural Resources and Conservation's (hereinafter referred to as "DNRC") interpretation of a 'combined appropriation' as established in 36.12.101 (13) ARM is consistent with applicable law under the Montana

Water Use Act, § 85-2-101 *et seq.*, MCA (hereinafter referred to as "MWUA") and should not be changed through Petitioners' Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13) ARM . DNRC's interpretation of 'combined appropriation' established in 36.12.101(13) ARM is reasonable and consistent with the stated policy and purposes of the MWUA and is consistent with the plain meaning of the language of Section 85-2-306, MCA. Petitioners attempt to usurp over 17 years of precedent and effectively amend Section 85-2-306, MCA to prevent any wells from being exempt from the DNRC's permitting requirements. This attempt at rule making is directly at odds with the requirements of the Montana Administrative Procedural Act (hereinafter referred to as "MAPA") as established in Section 2-4-305 (6), MCA. Lastly, there are several other forums or remedies that are more appropriate for the protection to their claimed senior water rights that Petitioners seek.

The MWUA, enacted in 1973, governs most aspects of the use and condition of all water resources in Montana, including the protection and adjudication of water rights predating July 1, 1973 and provides for the appropriation of both surface and ground water after this date. To that end, the MWUA provides that after July 1, 1973, any appropriation of water, both ground and surface, must be submitted to the DNRC and go through a permitting process. However, the Legislature, mindful of the increased burden of the permitting process, created a specific exception from the permitting requirement in the MWUA. The statute provides that those ground water appropriations that appropriate 35 gallons per minute or less and up to 10 acre-feet per year of water are exempt from DNRC's permitting requirements; thereby creating the term "exempt well". § 85-2-306 (3)(a), MCA. Section 85-2-306, MCA was enacted as an original part of the MWUA and

has gone through at least 20 separate amendments; on average more than one per legislative session. *See* history of § 85-2-306, MCA. However, the overall premise that an individual has the ability to appropriate a limited flow rate and volume of water without having to go through the permitting process has remained. This fact demonstrates the importance that the legislature has placed on allowing exempt wells and their acceptance within the purposes and policies of MWUA. Petitioners' suggest that two or more wells from the same source should be considered as a combined appropriation, irregardless of the owner and purpose of the appropriation, and that if those two appropriations exceed the flow rate and volume exemption limits, they have to go through the permitting requirements. Such an interpretation would completely eviscerate the Legislatures intent to create an exemption from permitting.

A careful reading of the whole statute would demonstrate that the purpose of the 'combined appropriation' language inserted into Section 85-2-306 (3)(a) in 1987 was not to require permitting of two or more appropriations from different persons utilizing the same source, but instead was to require permitting two or more appropriations by a single individual property owner who combined his appropriations together. The fact that the Legislature placed small flow rate and volume limitations on exempt wells indicates that the exemption was designed for those beneficial uses that do not need large amounts of water, nor consume very much water, i.e. domestic and stock water uses. The use of exempt wells for irrigation purposes, while occurring, is very inefficient and uneconomical and most exempt wells are for domestic use. But if the exempt wells could be connected and used in concert, then irrigation could be more feasible. It was for this reason that the 'combined appropriation' language was inserted. Therefore, DNRC's interpretation that any physically

combined appropriations are subject to permitting requirements if they exceed the flow rate and volume limitations is reasonable.

The DNRC's interpretation is also reasonable when reviewing Section 85-2-306, MCA as a whole. Section 85-2-306, MCA begins by providing that, "Except as provided in subsection (1)(b), ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works. § 85-2-306 (1) (a), MCA. The Legislature formulated and directed the entire statute at the idea that the exemption is for a single person who owns the property; therefore, the concern about combining appropriations is directed at a single person who owns the property and combines his appropriations. The concern was not for unrelated persons who are appropriating water utilizing wells on different properties but happen to be from the same source aquifer. This is the interpretation Petitioners assert.

MWWDA believes that the DNRC's interpretation that two or more appropriations by the same person must be physically combined together to constitute a 'combined appropriation' is a reasonable and common sense determination under the purposes and the policy of the MWUA and plain meaning of Section 85-2-306, MCA and that such interpretation by the agency as established in 36.12.101(13) ARM should be given deference and should remain unchanged. By the inclusion of language directed at owners of property it is reasonable that the Legislature was concerned with those property owners combining their appropriations physically together to feasibly use exempt wells for purposes that could not be done if used separately.

Any interpretation that a 'combined appropriation' includes separate appropriations

by individuals from the same source would lead to incongruent results and essentially make it impossible to meet the requirements for an exempt well. Under such an interpretation, two separate landowners on opposite ends of an aquifer who drill wells for separate and distinct purposes, would have to receive a permit if the two appropriations exceeded the flow rate and volume limitations. Another incongruent result would be if the same individual drills several stock water wells but does not combine them physically. Such an individual would have to permit those stock water wells if together they exceeded 35 gpm or 10 acre-feet per year. Furthermore, the determination of whether different individual appropriators are located in the same aquifer would be very difficult to determine and administer by the DNRC. Based on the plain meaning of the statute, a reasonable interpretation of the 'combined appropriation' language is that the legislature intended to allow exceptions to the permitting process for smaller ground water withdrawals by individual users, unless that individual combined those appropriations physically together to achieve beneficial uses that could not be done with individual wells.

Petitioners' attempt at rule making is in conflict with the requirements of MAPA. Any rule making which is in conflict with a statute and has the effect of changing a statute is prohibited by MAPA. *See* § 2-4-305 (6), MCA. Petitioners' requested changes would eliminate the exemption for small wells and is therefore at conflict with Section 85-2-306 (3)(a), MCA and should not be granted.

Based upon the length and breadth at which Petitioners claim that the use of exempt wells is harming their senior water rights, there are several forums and remedies which Petitioners should pursue to protect these claimed senior water rights. Each of these forums or remedies is more appropriate than trying to change the exempt well statute

through agency rule making. The first remedy is to assert their senior water rights at such time as they are impacted by junior water users. This was the law as it existed prior to July 1, 1973 and remains the law today. The MWUA recognized and confirmed all existing rights to the use of water for beneficial purposes pursuant to the Montana Constitution's Article IX, section 3(1). § 85-2-101(4), MCA. An "existing right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. § 85-2-102 (12), MCA. Montana is governed by the doctrine of prior appropriation, also termed 'first in right is first in time.' The protection under the law as it existed prior to July 1, 1973 was that senior water rights had to assert their status when junior appropriations impacted their water rights. Otherwise, the source was assumed to meet both appropriators' needs and the junior right could continue to divert water. So while an appropriation of groundwater for 35 gpm or less and not more than 10 acre-feet is known as an "exempt well", such appropriations are exempt only from the permitting process and not exempt from the prior appropriation doctrine governing water rights. Each new appropriation, whether granted through a permit or an exemption, is given a priority date. Therefore, these exempt wells are subject to a "call" by senior water right owners if the senior water right owners believe their own water rights are being diminished by the junior appropriators. If this were not the case, why does the DNRC give each certificate a priority date? There is nothing that prohibits junior exempt wells from being subject to curtailment to satisfy senior water rights. Ground water and surface water are treated as interrelated and are governed by the prior appropriation doctrine equally.

Petitioners could try to create a controlled ground water area if warranted by the condition of the specific aquifer at issue. Creation of a controlled ground water area

removes the ability to seek an exempt well, thereby forcing a more stringent review of the impacts any appropriation would have on the aquifer and other existing water rights. § 85-2-306 (2), MCA. Controlled ground water areas allow for the creation of narrowly tailored and specific criteria before any additional appropriations can be made to the source aquifer. Due to Montana's vast size and diverse water resources, the implementation of more narrow and more rigorous requirements is more desirable than the current attempted rule making that would implement state wide blanket restriction on the use of exempt wells.

The third forum Petitioners should explore is at the county level of subdivision and zoning regulation and review. If Petitioners believe that any new development utilizing exempt wells will adversely affect their senior water rights, they should voice those concerns during subdivision review of a proposed development or seek specific zoning requirements. Review of subdivision applications and the creation of zoning regulations is open to public comment before approval. Furthermore, during review of an application for subdivision review the impacts to the source of water supply must be considered and addressed before approval is granted. If the Petitioners are worried about development near the location of the points of diversion for their claimed senior water rights, they should voice those concerns to their respective county commissioners at the appropriate venues. Such comments have to be considered and addressed by the commissioners before approval of the subdivision. *North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County*, 2006 MT 132, ¶ 36.

Again, due to Montana's vast size and diverse water resources, the implementation of more narrow, more rigorous, and location specific requirements is desirable than the current attempted rule making that would implement state wide blanket restriction on the

use of exempt wells. Regulation at the county level would provide localized protection to senior water users in line with the stated policy of the continuation of the "wise utilization, development, and conservation" of water for "the maximum benefit of its people" if deemed appropriate by the respective county's elected officials.

The last forum available to Petitioners is to discuss their problems with the use of exempt wells is to seek change through the Montana Legislature. Petitioners' attempt to amend the DNRC's rule interpreting 'combined appropriations' would significantly change Section 85-2-306 (3)(a), MCA. Instead of seeking such rule making in direct conflict with MAPA, the Legislature is an available forum open to Petitioners to request a review of exempt wells. Currently, the Water Policy Interim Committee, charged by the legislature to review water policy issues both during and between sessions, is currently studying the impacts of exempt wells. Petitioners requested relief essentially amends Section 85-2-306 (3)(a), MCA so that the use of exempt wells will be eliminated in almost all situations. The Montana Legislature is the only forum capable of amending or repealing current statutes.

MWWDA thanks the DNRC for the opportunity to submit the following comments and respectfully requests that the current interpretation of 'combined appropriation' as specified in 36.12.101(13) ARM, remain without modification. DNRC's interpretation of a 'combined appropriation' from Section 85-2-306 (3)(a), MCA is reasonable in light of the policy and purpose of the MWUA and the plain language of Section 85-2-306, MCA.

Respectfully submitted this 30th day of April, 2010.

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MOORE, O'CONNELL & REFLING, P.C.

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**CERTIFICATE OF MAILING**

This is to certify that the above and foregoing was duly served upon the opposing counsel of record at their addresses, by mail, postage prepaid, this 30th day of April, 2010, as follows, to-wit:

Matthew K. Bishop
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Ryan Mattick
RYAN K. MATTICK